Software Rights Archive, LLC v. Google Inc. et al Doc. 57

EISENBERG AND HANCOCK, LLP

November 7, 2006

The Honorable Vaughn R. Walker
Chief Judge, United States District Court
450 Golden Gate Ave.
San Francisco, CA 94102

Re: *National Security Agency Telecommunications Records Litigation*
MDL Docket No. 06-1791 VRW

Dear Chief Judge Walker:

We write pursuant to paragraph (1)(b) of this Court's order dated October 16, 2006, which invites attendance at the hearing scheduled for November 17, 2006, by "[p]ersons who are not named as parties in this litigation but may later be joined as parties or are parties in related litigation pending in other courts."

We are counsel for the plaintiffs in *Al-Haramain Islamic Foundation, Inc. v. Bush*, No. CV-06-274-KI, which is currently pending in the United States District Court for the District of Oregon, and also is pending before the Judicial Panel on Multidistrict Litigation as a potential tag-along action with the *National Security Agency Telecommunications Records Litigation*.

The *Al-Haramain* litigation challenges the legality of actual instances of warrantless electronic surveillance of the *Al-Haramain* plaintiffs. The case is unique among all the transferred cases and potential tag-along actions in that a document filed under seal with the Oregon district court – which the government previously disclosed to the *Al-Haramain* plaintiffs by accident – proves that the *Al-Haramain* plaintiffs were actual targets of warrantless surveillance and thus indisputably have standing to sue.

We write to inform this Court that Jon B. Eisenberg will attend the hearing scheduled for November 17, 2006, on behalf of the *Al-Haramain* plaintiffs, and also to apprise the Court of the current status of the *Al-Haramain* litigation.

The *Al-Haramain* plaintiffs are Al-Haramain Islamic Foundation, Inc., an Oregon nonprofit corporation, and two of its attorneys, Wendell Belew and Asim Ghafoor. The plaintiffs filed their complaint on February 28, 2006, alleging violations of the Foreign Intelligence Surveillance Act (FISA), the constitutional separation of powers, the First and Fourth Amendments, and the International Covenant on Civil and Political Rights. The *Al-Haramain* defendants are President George W. Bush, the National Security Agency (NSA), NSA director Keith B. Alexander, the Office of Foreign Assets Control

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(OFAC), OFAC director Robert W. Werner, the Federal Bureau of Investigation (FBI), and FBI director Robert S. Mueller III.

The *Al-Haramain* defendants moved for dismissal of the action, or in the alternative for summary judgment, based on the state secrets privilege. The district court judge, Honorable Garr M. King, denied defendants' state secrets motion on September 7, 2006. *See Al-Haramain Islamic Foundation, Inc. v. Bush*, 2006 WL 2583425 (D. Or. 2006).

In his opinion denying the state secrets motion, Judge King explained: (1) because of official statements and publications by high government officials and agencies, the existence of the warrantless surveillance program "is not a secret, the subjects of the program are not a secret, and the general method of the program – including that it is warrantless – is not a secret"; (2) because of the inadvertent disclosure of the document filed under seal in the *Al-Haramain* case, "it is not a secret to plaintiffs whether their communications have been intercepted"; and (3) "where plaintiffs know whether their communications have been intercepted, no harm to the national security would occur if plaintiffs are able to prove the general point that they were subject to surveillance as revealed in the Sealed Document." *Al-Haramain Islamic Foundation, Inc. v. Bush*, 2006 WL 2583425 at *6-*8. Judge King therefore held he "will permit plaintiffs to file *in camera* any affidavits attesting to the contents of the [sealed] document from their memories to support their standing in this case and to make a *prima facie* case." *Id.* at *13. Judge King also stated he "will schedule a discovery conference" for the parties to address several pending discovery issues. *Id.* at *16.

Judge King certified his decision for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *See Al-Haramain Islamic Foundation, Inc. v. Bush*, 2006 WL 2583425 at *17. On September 20, 2006, the defendants filed in the Ninth Circuit a petition to accept the interlocutory appeal. On September 29, 2006, the plaintiffs filed opposition to the defendants' Ninth Circuit petition. The Ninth Circuit has not yet ruled on the petition.

On August 9, 2006, the Judicial Panel on Multidistrict Litigation transferred 15 civil actions to this Court for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. On August 31, 2006, the Panel issued a conditional transfer order (CTO-1) for a number of additional cases, including the *Al-Haramain* litigation. The *Al-Haramain* plaintiffs have filed a motion to vacate the conditional transfer order as to them. It is anticipated that the Panel will rule on the motion after the Panel's next hearing, scheduled for November 30, 2006.

On October 30, 2006, the *Al-Haramain* plaintiffs filed in the Oregon district court a "Motion For Partial Summary Judgment Of Liability Or, Alternatively, For Partial Summary Adjudication Of Specific Issues Within Claims." The motion seeks a determination of the plaintiffs' standing (by reference to the sealed document as contemplated in the Court's opinion of September 7, 2006) and a determination of the purely legal issues concerning the lawfulness of the government's warrantless surveillance program. The resolution of those legal issues will determine the future course of the *Al-Haramain* litigation and will also affect the cases pending before this Court in the *National Security Agency Telecommunications Records Litigation* if *Al-Haramain* is transferred to this Court.

During a telephonic hearing on November 1, 2006, Judge King stated he would defer responsive briefing on plaintiffs' pending motion for partial summary judgment or adjudication, and also would defer scheduling of the pending discovery conference, until after the Judicial Panel on Multidistrict Litigation rules on the *Al-Haramain* plaintiffs' motion to vacate the Panel's conditional transfer order.

Finally, on October 24, 2006, the *Al-Haramain* defendants filed a motion in the Oregon district court for a stay of further proceedings pending a decision by the Ninth Circuit on the defendants' petition for an interlocutory appeal. On November 1, 2006, the *Al-Haramain* plaintiffs filed opposition to the defendants' motion for a stay. Judge King has not yet ruled on the motion.

Respectfully submitted,

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